

[To be reported by Lord PITFOUR.]

July 5. 1766

*Isobell Mcneill
& Liliase Campbells*

M E M O R I A L 20th Nov: 1766

F O R

Colin Campbell of Ederline, Trustee
Angus Campbell of Dunstafnage;

A G A I N S T

Mrs Isabel Macneil, Liliase and Margaret
Campbells.

*Find That the
provisions to the Wife
for are void. Find that
the provisions to the
Daughters are not
exorbitant by the Deeds
1758 & 1761. Therefore
Find the bonds given
to them in 1752 are those
to w^h only they are
intitled.*

NEIL CAMPBELL of *Achnard*, thereafter of *Dunstaf-*
nage, intermarried with Mrs *Isabel Macneil*, now his
Widow; and by the Marriage-articles, of this Date, Sep. 27.
he becomes bound, in the Event of her Survivance, 1727.
to pay her a yearly free Annuity of 500 Merks out of the
Rents of *Achnard*; to furnish her a suitable Mansion-house
upon said Lands to the Value of 500 Merks; and in case of
no Children, she is thereby provided to the equal half of all
free Moveables and Household Plenishing, and to the half
of what Conquest shall be made after the Marriage. But in
case of Children, she is only provided to the third Part of
the free Moveables, and half of the Conquest, and the Fee of
the whole Conquest to the Heir-male of the Marriage.

A

As



As the Estate of *Achnard* stood provided to Heirs-male ; so in case there should be but one only Daughter of that Marriage, she was provided to 5000 Merks ; and if two, or more, to the Sum of 6000 Merks.

April 30.
1751.

By Marriage-contract, of this Date, between *Angus Campbell*, therein designed eldest Son and presumptive Heir to *Neil Campbell* of *Dunstaffnage*, with Advice and Consent of his said Father, and Mrs *Margaret Campbell*, eldest Daughter of the deceased *Dougal Campbell* of *Ederline*, with Consent of her Brother, the now Pursuer, on the other part, *Neil Campbell* the Father became bound and obliged to settle and provide the Estate of *Dunstaffnage*, to which by this Time he had succeeded, to and in favour of himself in Liferent, and, after his Decease, to and in favour of the said *Angus Campbell* in Liferent, and the Fee of the same, after both their Deceases, to the Heirs-male of said *Angus Campbell* his Body of that or any subsequent Marriage ; which failing, to the said *Neil Campbell* his Heirs-male : And he thereby restricted himself from burdening the said Estate with any more Debts than what he presently owed, and such Provisions as he should make to his Children.

From the Conception of this Marriage-contract, it became Matter of Doubt, where the Fee vested, whether in *Neil* the Father, or in *Angus* the Son, though described to be but Liferenters, or in the Heir-male of the Marriage when he should exist.

But whatever might be the Construction of the Contract in that Respect, it seemed a clear Case, that such a *jus crediti* was thereby created in favour of *Angus* the Son, and the Heirs-male of the Marriage, that *Neil* the Father could by no voluntary or gratuitous Deed, hurt or prejudice their Right, or charge the Estate, with any more Debt than those he already owed, and suitable Provisions to his younger Children.

But as, notwithstanding thereof, and of the great Load of Debt with which the Estate stood charged, and of which more
in

in the Sequel, *Neil* the Father was pleased, by a Series of Deeds, one after another, to augment the Provisions both of his Wife and two Daughters, beyond what the Estate could possibly bear, it is the Validity of these that is now the Subject of Question.

In the View of challenging these, and to avoid the Danger of a passive Title, *Angus Campbell*, upon the Death of his Father *Neil*, granted a Trust-bond to his Brother-in-law *Colin Campbell* of *Ederline*; who thereupon obtained an Adjudication of the Estate of *Dunstaffnage*; and upon that Title brought a Reduction of the additional Provisions, which had been elicited in favour of the Widow and Daughters, as in defraud of his and his Childrens Right by the aforesaid Marriage-contract.

It has been already noticed, that by *Neil's* own Marriage-contract, his Wife was provided to an Annuity of 500 Merks, and to the half of the free Moveables, Household Plenishing, and Conquest; restrictable to the third of Moveables, and half of Conquest, in case of Children; and that 500 Merks was to be bestowed in building a House for her.

And your Lordships have also heard, that by the Settlement in *Angus's* Marriage-contract, no further Power was reserved to *Neil* the Father, but to charge the Estate with the Debts which he then owed, and Provisions to his Children.

By Deed, of this Date, proceeding upon the Recital of the Marriage-articles, and of the Provisions therein contained in favour of the said *Isabel Macneil*, all specially recited, and of its being just and reasonable, that she should be further secured in the Liferent-annuity, and other Provisions in her favour, he of new became bound to pay her the aforesaid Liferent-annuity of 500 Merks out of the Lands of *Achnard*, and to provide her in a suitable Mansion-house, to the Value of 500 Merks; which, in so far, were agreeable to the Obligation in the Marriage-contract: But in place of the Obligation respecting the Conquest, which intitled her only to a half of such

June 20.
1728.

such Lands as should be purchased during the Marriage, the Clause, as taken in to this corroborative Security, is conceived in these Words: " And in like manner, I hereby bind
 " and oblige me, and my forefaids, to provide and secure all
 " and whatsoever Lands, Heritages, Tenements, Annual-
 " rents, Wadsets, Apprisings, Adjudications, and other he-
 " ritable Subjects that shall be conquest or acquired by me,
 " or which shall fall and pertain to me, to myself, and my
 " said Spouse, and longest Liver of us two in conjunct Fee
 " and Liferent; and the Fee of the said whole Conquest, to
 " the Heirs to be procreate betwixt us; which failing," &c.

It will not easily be believed, that by this last-mentioned Deed, bearing expressly to be granted in further Security of the Provisions in the Marriage-articles, it could possibly be intended to give this Lady the total Liferent, not only of what heritable Subjects he should acquire, but also of what should fall to him by Succession, particularly of the Estate of *Dunstaffnage*, to which he had an immediate and certain Prospect of succeeding; though the Widow was disposed to construe these Words in this corroborative Security, *or what shall fall and pertain to me*, as if intended to give her the Liferent of the whole Estate of *Dunstaffnage*.

But it is unnecessary to dispute, whether the Clause could admit of this Construction or not, because supposing such to be the Import of the Deed, as it was clearly a *donatio inter virum et uxorem quoad* the Excess, it was revokable, and revoked by the after Settlement in his Son *Angus's* Contract of Marriage.

Laying this out of the Case, it is the other Deeds granted by *Neil* in favour of his Widow and Daughters, upon which any Doubt can arise.

It has been already observed, that by *Neil's* Marriage-articles, the Provisions to the Daughters were ascertained to be 5000 Merks if one, and 6000 Merks, if two or more; in the Event only that there should be no Heirs-male of the Marriage,

riage, whereby the Estate would pass to collateral Heirs-male.

And therefore when *Neil*, in his Son's Contract of Marriage 1751, reserved to himself a Power to charge the Estate with Provisions for his Daughters, it certainly could never be intended, that these Provisions, paid by their Brother, should be greater than they would have been, if paid by the collateral Heir-male.

But in order to prevent any after Questions of this kind, it was thought proper, that *Neil* should exercise this reserved Power, by ascertaining explicitly what Provisions his two Daughters should be intitled to.

Accordingly by Deed, of this Date, which proceeds upon Feb. 17. a Recital of *Angus's* Contract of Marriage, and of the Faculty thereby reserved, of granting Provisions to his younger Children; and that there was then an Heir-male existing of his Son's Body; "and of its being therefore just and reasonable, that he should, in implement of the Faculty thereby reserved to him, condescend upon the Provisions that he shall make to the Children already procreated of his Body; he therefore binds and obliges him, &c. to provide and secure 4000 Merks to his eldest Daughter *Lilias*, and 3000 Merks to his other Daughter *Margaret*; and in case of the Death of either of his Daughters, the half of her Portion to accresce to the surviving Daughter." And to satisfy your Lordships, that this was intended finally to ascertain the Burden that was to lie upon *Angus* for the Provisions of these Daughters, he reserved to himself a Power to diminish the same, if an Heir-male should exist of his own Body, and to augment it failing Heirs-male of his Body; the plain Language of which is, that being thus once fixed, they were not thereafter to be augmented, in prejudice of the Heir-male of the Marriage. Nor could the Daughters with any Reason complain of this, as their Provisions were thereby augmented 1000 Merks beyond what was stipulated for them.

them in *Neil's* Marriage-articles, supposing the Estate to have gone to a collateral Heir.

Jan. 25. 1758. But *Neil* did not stop here; for by another Deed, of this Date, he was pleased to give his Wife an additional Jointure of 200 Merks, failing Heirs-male of his own or his Son's Body, and 100 Merks suppose an Heir-male of his Body should exist; and instead of the 500 Merks to be laid out in building her a House, he obliged himself to build her one, to the Value of 1200 Merks. He gives her 1200 Merks, or the Value thereof in Cattle, his best riding Horse, his hhill Sheep, and the half of his Household Plenishing, in lieu of her Share of Moveables. He provides her further to the Maintenance of six Cows and a riding Horse, sowing of so many Bolls of Grain, and planting so many Bolls of Potatoes; and till the Jointure-House should be built, gives her the Mansion-House of *Dunstaffnage*, and five Inclosures adjoining thereto, with the Arrage and Carriage of other Parts of his Estate, for a trifling Rent of *L. 12 Sterling*.

Thus far with respect to the Wife's Interest: And it is believed your Lordships will think that these were no contemptible Additions to her Liferent-annuity of 500 Merks, and 500 Merks for building a House, which was all the certain Provisions stipulated to this Lady.

He then proceeds to the Daughters, and instead of the 7000 Merks to which they were provided by the Deed 1752, and which the Pursuer should never have thought of quarrelling, he augments his Daughter *Lilias's* Provision to *L. 300*, and his Daughter *Margaret's* to *L. 200*, in case there should be no Heir-male of his or his Son's Body, restricting to the 7000 Merks in case that Heirs-male should exist; and he also obliges himself, to pay to his said Daughters *L. 45 Sterling* of Aliment, if no Heir-male existed of his own Body, and *L. 35* if an Heir-male did exist, and to bestow *L. 60* in educating the youngest at *Edinburgh*.

These greatly exceeded the Provisions 1752. But not satisfied

tisfied with this, he, by another Deed, of this Date, but a few Months before his Death, confirmed all these additional Provisions in favour of his Wife and Children, gave the Wife the Liferent of all the Silver Plate, raised the Value of the Jointure-house to be built to L. 70, augmented the Daughters Provisions to L. 800, if no Heir-male should exist, and increased their Aliment from L. 35 to L. 50, even though an Heir-male should exist.

The Father's Power to grant these additional Provisions, in prejudice of his Son's Right by the aforesaid Marriage-contract, and supposing he had Power, whether they were rational or not, was the Subject of Debate before Lord *Pitfour*, who took the same to report; as also an Objection which had been stated to the Pursuer's Title.

Memorials were accordingly exhibited, and the Case reported, when the following Interlocutor was, of this Date, Jan. 14. 1766. pronounced. "On Report of the Lord *Pitfour*, the Lords "repel the Objection to the Pursuer's Title; and find, that "the Fee of the Lands was in the Father, and after his "Death in the Son; and remit to the Lord Ordinary to hear "Parties Procurators further on the Value of the Estate, and "Extent of the Debts affecting the same, and to do therein "as he shall see Cause."

As Parties seem now to be pretty much at one upon these Facts, the Lord Ordinary is again to report the Cause, and this Memorial is humbly offered on the Part of the Pursuer.

And as the Interests of the Widow and of the Daughters stand upon very different Footings, he will take the Liberty to consider them separate.

And to begin with the Interest of the Widow, it is truly inconceivable upon what Principle of Law or Justice her Claim for these additional Provisions can be maintained. Her Provision was settled by her Marriage-articles, and every thing beyond that was merely gratuitous. The Estate of *Dunstaffnage* was settled upon *Angus* in his Marriage-contract, and

and the Heirs-male of that Marriage, with the Burden of what Debts the Father then owed, and of what Provisions he should give to his younger Children. This Marriage-settlement created a *jus crediti* in favour of *Angus*, and the Heirs-male of that Marriage, which could not be affected by any gratuitous Deeds, further than what regarded the reserved Faculty of giving Provisions to the Daughters. There was no such Power in the Article with regard to the Wife, whose Provision was already settled; and therefore, without disputing whether these additional Provisions were rational or not, it is humbly submitted, whether they can be effectual against the Pursuer, as in Right of *Angus*, Creditor by the aforesaid Marriage-contract.

The Question with respect to the Daughters, depends upon different Principles. And, in the 1st place, as your Lordships have heard, that upon the Existence of an Heir-male of the Marriage, *Neil*, upon a special Recital of the Powers reserved to him to give Provisions to his Daughters, and that it was reasonable they should then be settled, did ascertain 4000 Merks to the eldest, and 3000 to the youngest, being 1000 Merks more than was stipulated for them by their Mother's Marriage-articles, even in the Case of a collateral Heir-male; the Pursuer humbly submits it to your Lordships, that *Neil* having thereby exercised the reserved Faculty for providing his Daughters out of the Estate of *Dunstaffnage*, provided to the Son in his Marriage-contract, he was thereby *functus*; the Faculty being once exercised, could not again revive.

And truly, according to this Argument, he might have gone on to the End of the Chapter, augmented these Provisions from Day to Day, whereby the eldest Son's Situation must have been rendered extremely precarious.

But supposing, for Argument's sake, that it was still competent for *Neil* to have augmented these Provisions, this can never go further, than to intitle him to give rational Provisions:

sions: And as 6000 Merks was by the Marriage-articles judged a suitable Provision for two Daughters, supposing the Estate to have gone to a collateral Heir-male, it cannot be thought, that 7000 Merks was unsuitable when the Estate was to go to the Son of the Marriage.

But as your Lordships were desirous to be more particularly informed of the Value of the Estate, and Amount of the Debts affecting the same, a State thereof will be hereto subjoined.

From this State your Lordships will observe, that in the one View, deducing the Annuities and Interest of Debts, all that will remain for the Heir of the Family will be *L. 31, 19 s. 8 d. Sterling*, subject to all Accidents, Bankruptcies, Expences of Management, &c.; and that in the other View, supposing the additional Provisions to take place, there will be a Shortcoming *L. 14: 11: 5*; in either of which Views, the Heir, who is the *prædilecta persona*, would be in a worse Case than either of the younger Children.

To obviate this Difficulty, the Defenders have procured a Letter from *Alexander Macneil*, making a twofold Offer, *viz.* either to purchase the whole Estate at *L. 10000* Price, or to take a Lease of it for 38 Years, at a Rent of *L. 300 Sterling per annum*; and upon Supposition that such is the true Value of the Estate if sold, or that it can afford so much a higher Rent than it now pays, if let for such a long Course of Years, they hold this to be real Evidence that it can well admit of the additional Provisions here claimed, both to the Widow and Daughters.

Whether these Offers are seriously intended, or if only meant to serve the Purpose for which they are now used, may with Reason be doubted, as he is the Lady's Brother. This has been a common Device in Questions of the like Nature, but to which your Lordships are not in Use to pay any Regard.

And more particularly, as to what respects the proper Purchase of the Estate, settled and provided by *Angus's* Marriage-

riage-contract upon the Heir-male of that Marriage, with the Burden of the Debts then owing, and a Faculty to give rational Provisions to younger Children, he submits it to your Lordships, that nothing would be more adverse to the whole Spirit of that Settlement, than the granting such Provisions to younger Children, as should make it necessary to sell the Estate for Payment of these. It is the Estate itself which is so settled and secured to the Heir of the Marriage, not the Reversion of the Price after Sale. It was upon the Faith of this Settlement that the Marriage itself was gone into ; and therefore it can never be understood to have been the Meaning of Parties, that the Father by granting exorbitant Provisions to younger Children, should disappoint the Settlement of the Estate itself.

This is clear beyond Dispute, as to the additional Provisions in favour of the Wife, beyond what she was intitled to by her Marriage-contract, these being merely gratuitous and voluntary, supported by no Obligation natural or civil.

And though the Provisions to the Daughters, even with the Addition made to them, when considered in the Abstract, may not appear exorbitant, was there a proper Fund out of which they could be paid, without overburdening the Heir of the Marriage, the Quantum of these in point of Rationality must necessarily depend upon the Circumstances of the Estate, they must be granted *salvo tenemento*, the Heir must not be beggared, in order to afford larger Provisions to the Daughters ; and it would be highly unreasonable to oblige him to sell his Estate, in order to make good these.

6000 Merks was held to be a suitable Provision for two Daughters by their Mother's Contract of Marriage, supposing the Estate to have gone to collateral Heirs : So that when by the Deed 1752 they got 7000 Merks, payable in all Events, they have no Cause to complain of being unsuitably provided : And it is believed, that few Gentlemens Daughters in
that

that Part of the Country, even where the Estates can better afford it, have larger Provisions given to them.

The other Offer, of taking a Tack of the Estate for 38 Years at *L.* 300, is intended merely for a Blind; it is well known, that a great Part of the Estate is presently under Leases for several Years yet to run; so that the Pursuer has it not in his Power, was he ever so well disposed, to comply with this Offer; nor can he think that it is incumbent upon him to divest himself totally of all Management of his Estate for such a Length of Time, in order to raise additional Provisions to these Daughters.

When the Daughters Provisions were settled by the Deed 1752, which augments them from 6000 to 7000 Merks, *Neil Campbell* was justly of Opinion, that this was all the Estate could reasonably afford for Provision to two Daughters, a due Regard being had to the Interest of the Heir of the Marriage, loaded with other Debts to so great an Extent; the Estate was in no better Condition when he granted these additional Provisions to the Widow and Daughters, which therefore is Demonstration, that these must have been obtained from him by improper Influence.

In respect whereof, &c.

ALEX. LOCKHART.

View of the present *Dunstaffnage's* Situation, supposing the
Bond of Provision in the 1752 to take place.

Rent of the Estate of <i>Dunstaffnage</i> at present is	-	-	L. 255 17 8
To Annualrent of the Sum of L. 3801 : 5 : 9 $\frac{2}{3}$			
Sterling of Debts, including the Provisions to			
the Daughters, at 5 per cent.	-	-	L. 190 1 3
Annuity to <i>Archibald Campbell's</i> Widow,	-	-	5 11 1 $\frac{1}{2}$
The Widow's Jointure is	-	-	27 15 6 $\frac{2}{3}$
			L. 223 17 11 $\frac{1}{2}$
Remains to the Heir	-	-	L. 31 19 8 $\frac{1}{2}$

View of the present *Dunstaffnage's* Situation, supposing the
Bond of Provision in the 1761 to take place.

The Annualrent of the Burdens affecting the E-			
state, per Deed 1752, is as above,	-	-	L. 223 17 11 $\frac{1}{2}$
Annualrent of the additional Provision to the			
Daughters, being 2000 Merks of Addition,	-	-	5 11 1 $\frac{2}{3}$
Additional Aliment to Ditto,	-	-	25 0 0
Additional Jointure to the Widow,	-	-	5 11 1 $\frac{2}{3}$
Annualrent of an additional Sum for a Jointure-			
house,	-	-	2 2 2 $\frac{1}{2}$
Sowing Corn, Bear, Potatoes, and Grass for			
Cows and Horses, converted at	-	-	2 6 8
			L. 270 9 1
Rent of the Estate,	-	-	255 17 8
Sum yearly affecting the Estate,	-	-	L. 14 11 5

